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CASE NO. 93-2071

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PINELLAS COUNTY, FLORIDA,

Petitioner,

v.

CH2M HILL SOUTHEAST, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

		Page
Table of Authorities		ii
Opinions Below		2
Statement of the Case		3
A.	Introduction	3
B.	The trial	3
C.	The *Hill One* appeal	4
D.	Proceedings on remand before the trial court	5
E.	The *Hill Two* appeal	6
Argument		7
I.	There has been no due process violation in the state court proceeding, whether characterized by the County as lack of opportunity to be heard or a denial of access to the courts	7
II.	The County has provided no plausible basis for the Court's review	14
Conclusion		17

TABLE OF AUTHORITIES

Page

Cases

CH2M Hill Southeast, Inc. v. Pinellas County
598 So. 2d 85 (Fla. 2d DCA),
review denied, 613 So. 2d 7 (Fla. 1992) 2

Harrison v. Springdale Water & Sewer Comm'n
780 F.2d 1422 (8th Cir. 1986) 14

Hooks v. Wainwright
352 F. Supp. 163 (M.D. Fla. 1972) 16

Michigan v. Long
463 U.S. 1032 (1983) 9

Monroe Division, Litton Business Systems, Inc. v. De Bari
562 F.2d 30 (10th Cir. 1977) 15

Pinellas County v. CH2M Hill Southeast, Inc.
638 So. 2d 68 (Fla. 2d DCA 1994) 1

Procup v. Strickland
760 F.2d 1107 (11th Cir. 1985) 15

Robinson v. Ariyoshi
753 F.2d 1468 (9th Cir. 1985),
vacated, 477 U.S. 902 (1986) 16

Wolff v. McDonnell
418 U.S. 539 (1974) 16

TABLE OF AUTHORITIES
(CONTINUED)

Page

Statutes

§ 1983, Civil Rights Act 14

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Respondent CH2M Hill Southeast, Inc. (Hill) files this brief in opposition to the petition for writ of certiorari brought by Pinellas County to review *Pinellas County v. CH2M Hill Southeast, Inc.*, 638 So. 2d 68 (Fla. 2d DCA 1994). Hill respectfully requests that the Court

deny the petition to review that decision, here referenced as "***Hill Two***."

The petition presents no valid claim under the United States Constitution, as the *Hill Two* decision is a fact-bound determination which is substantively grounded in *state* law concepts. The County's thematic contention that it has been denied the opportunity to present "well pled" contract claims in a lawsuit against Hill, and hence access to the courts, is simply not borne out by the record.

In two elaborately briefed and thoroughly argued appellate proceedings, the Second District Court of Appeal of Florida found from the County's contract with Hill, and from the County's First Amended Complaint in its suit against Hill, that the only contract breach *well*-pled by the County inhered in the so-called "class IV wire" issue which *has been* preserved for the County to pursue. There has been no error in process due the County, either of a constitutional or other dimension.

OPINIONS BELOW

In addition to the opinions and orders which the County has brought to the Court's attention, the Court should consider the mandate of the Second District which followed its decision in *CH2M Hill Southeast, Inc. v. Pinellas County*, 598 So. 2d 85 (Fla. 2d DCA), *review denied*, 613 So. 2d 7 (Fla. 1992), for convenience referenced as "***Hill One***." That order, which forms the foundation for the action of the trial court of which the

County now complains, is reprinted as Appendix 1 to this brief.

STATEMENT OF THE CASE

A. Introduction

The County's Statement of the Case is both inaccurate and incomplete. It also contains a number of argumentative assertions which are unsupported by the record of the proceeding below. Consequently, pursuant to Supreme Court Rules 15.1 and 24.2, Hill presents this corrected statement of the course of this proceeding from an invalid first trial through two Florida appellate proceedings.

B. The trial

This proceeding went to trial in 1989 on the County's First Amended Complaint against Hill, alleging negligence and breach of contract. (Appendix M). The County's allegations of contract breach by Hill were contained in a one-sentence Count of the complaint which merely incorporated by reference the twenty-two, detailed *tort* allegations contained in another Count of the complaint. (Appendices M-24 through M-30; Z-77 through Z-83). Following a one-year non-jury trial, the trial court signed a 200-page final judgment for the County which was drafted by counsel for the County, and which held

for the County on every imaginable legal and factual theory.[1/] (Appendix 2-16; Appendix G-3).

C. The *Hill One* appeal

Hill appealed to the Second District. In its appeal, Hill raised a host of issues ranging from disqualification of the trial judge to the legal soundness of the County's tort, contract and damage claims. All contract breach allegations of the County were brought before the Second District in Hill's appeal (Appendix 2), and the Second District considered all of those issues.

In due course, the Second District reversed and vacated the County's judgment, and remanded for a new trial. In addition to finding disqualifying improprieties by the trial judge, the court expressly held that Florida law barred all of the County's tort claims, precluded the County's theory of merging the Hill Contract with an unrelated contract between the County and the pipe manufacturing company, Interpace, and foreclosed all alleged contract claims under a plain reading of the Hill Contract other than one which was properly pled as an alleged breach of design responsibility under the Hill Contract. (Appendix G). The court held that Hill was entitled to "judgment as a matter of law on all issues save one" (Appendix G-5) after a "reading of the Hill Contract, a function wholly within our scope of review [Florida state law citation omitted]." (Appendix G-6).

1/ Hill has attached its initial brief in *Hill One* as Appendix 2 to this brief, as only excerpts from the brief were filed by the County as its Appendix W.

The only issue on retrial was to be whether it was a breach of Hill's "design responsibilities [to allow] the pipe manufacturer to use class IV wire for the pipeline." (Appendix G-7).

The County filed a motion for rehearing, for certification to the Florida Supreme Court and for clarification, in which it argued at length that the court improperly rejected contract claims other than the class IV wire issue.[2/] The court denied rehearing,[3/] and subsequently issued its mandate commanding "that further proceedings be had in said cause *in accordance with the opinion of this Court* . . . ." (Appendix 1-1) (emphasis added). The decision of the Second District in *Hill One* was taken by the County for discretionary review to the Supreme Court of Florida, and became final for all purposes when that review was denied.[4/]

The decision of the Second District in *Hill One* is *not* before the Court for review at this time, although as will be detailed that is the intent of the County's petition.

2/ The County's motion for rehearing in *Hill One* is attached as Appendix 3.

3/ The Second District's order denying rehearing is attached as Appendix 4.

4/ Appendix 5.

D. Proceedings on remand before the trial court

On remand following the Second District's decision in *Hill One*, the County again challenged the restriction that retrial be had only on the one issue of a possible design breach regarding the use of class IV wire. The County's position before the trial court with respect to the opinion of the Second District pulled no punches:

> Frankly, it's a preposterous Opinion, it absolutely flies in the face of everything that we know about construction documentation, but that's what they have done.

(Transcript of hearing before the Pinellas County Circuit Court on March 3, 1993, an excerpt of which is attached as Appendix 6, at 6-8).

After hearing argument from counsel and reviewing memoranda of law, the trial court entered partial final judgment in exact conformity with the opinion and mandate of the Second District. (Appendix D). In due course, the trial court also denied the County's motion for rehearing. (Appendix F).

E. The *Hill Two* appeal

The County appealed the trial court's partial final judgment to the Second District on the ground that the Second District's opinion in *Hill One* had improperly restricted the issues on retrial. The County

necessarily addressed the state law doctrine of "law of the case," and it asserted that the trial judge was wrong in entering an order which complied with the appellate court's mandate. (Appendix Z). In support of its arguments, the County made the entire record of the *Hill One* appeal a part of the record of the *Hill Two* appeal. (Appendix Z-6).

After full briefing and oral argument, the court affirmed the trial court's partial final judgment in a summary decision which re-approved the limitation on retrial to only one contract issue, citing to the court's earlier *Hill One* decision. (Appendix A). A subsequent motion for rehearing by the County was denied. (Appendix C).

ARGUMENT

I. There has been no due process violation in the state court proceeding, whether characterized by the County as lack of opportunity to be heard or a denial of access to the courts.

The County's petition to the Court recognizes that any claim of due process denial or access to court is dependent on the presence of "well pled" allegations.[5/] The Second District had held in its *Hill One* decision, from careful review of the Hill Contract and the County's First Amended Complaint, that under Florida law the County had only one well-

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5/ The term "well pled" appears in the County's petition on pp. 4, 12, 14, 15, 16, 20 and 28.

pled contractual claim. The County's First Amended Complaint was found by the court to be a potpourri of impermissible legal theories, all but one of which had no record or legal foundation under Florida law.

Quite unremarkably, the Second District rejected as a matter of state contract law the County's "merger" of contract theory, by which the County sought to bind Hill to perform promises made by the pipe manufacturer in its wholly distinct contract with the County. The Second District applied Florida law which made untenable the legal theory on which the County postulated Hill's enlarged contractual liability. (Appendix G-6 and 7). The Second District further refined the limited range of Hill's potential contractual liability with a meticulous review of the terms of Hill's contract with the County -- a function the Second District appropriately recognized as being within its scope of review under state law. (Appendix G-5 and 6). That analysis eliminated the County's contention that Hill was responsible for the manufacturing oversight of the pipe segments, a premise for contractual liability found nowhere within the terms of Hill's contract with the County. The Second District also rejected the County's negligence claims, on another independent and adequate ground of Florida jurisprudence -- the "independent tort" doctrine which insists that an allegation of tort be more than an assertion of an egregious breach of contract. (Appendix G-5).

The *Hill One* decision of the Second District quite clearly sorted the well-pled wheat from the improperly-pled chaff. The record review and analysis performed by the Second District in *Hill One* was conducted on well-recognized grounds of Florida

contract law, clearly articulated in the *Hill One* decision as independent and adequate for its decision. *Michigan v. Long*, 463 U.S. 1032 (1983).

The *Hill Two* decision of the Second District arises from the County's insistence that the court revisit and re-evaluate its *Hill One* decision. The contract issues decided in *Hill One* were simply re-argued in *Hill Two*, and the court's decision in the second appeal was nothing more than a summary re-affirmation of the *Hill One* determination that the County had only one well-pled contract issue. Thus, the decision of which the County now complains is not the *Hill Two* decision presently before the Court, but rather the *Hill One* decision which had much earlier become final and unreviewable.

The first point on appeal argued by the County in *Hill Two* was a discussion of Florida's "law of the case" doctrine. (Appendix Z-3). Hill answered the County's analysis of that state law doctrine with its own analysis of the doctrine, and it pointed out as well that the Florida appellate rule governing rehearing made the County's re-argument of *Hill One* untimely. (Appendix 7). The Second District's decision in *Hill Two* is fully supported both by the Florida doctrine of "law of the case," and by the Florida rules of appellate procedure governing rehearing.

By its request for review, the County now asks the Court the same basic question that it posed to the Second District in *Hill Two*: whether the *Hill One* decision was correctly decided. The Court could attempt the same evaluation of the record of the *Hill One* case in search of an answer, but the Court's labor

can be shortcut simply by looking at the Statement of the Case in the County's Petition. There the County has included a section entitled "Summary of Well Pled Breach of Contact Allegations." (Petition 4 through 9). That Summary establishes beyond any doubt why the Petition should be denied.

The County's recitation of allegedly "well-pled" contract claims (Petition 5 through 9) are *exactly* the claims made in its initial brief to the Second District as a prelude to arguing Florida's "law of the case" doctrine. (Appendix Z-20 through Z-32). These claims were responded to by Hill, point-by-point, in noting for the Second District that each claim was traceable to issues rejected in the *Hill One* decision. (Appendix 7-25 through 40).

The *Hill Two* decision of the Second District is fully supported by Florida's law of the case doctrine: a clearly delineated, independent state law ground that was presented by the County and argued by both parties. Indeed, the County's petition does not suggest, because it could not, that the law of the case determination in *Hill Two* is anything other than an independent and adequate state ground for decision.

Were the Court to go beyond a facial review of the issues before the Second District in *Hill Two* to an independent analysis of the County's complaint, the Hill Contract, and the decision of the Second District in *Hill One*, the Court would find beyond any doubt that the basis for the County's complaint of due process violations is grounded in the *Hill One* decision. The allegations enumerated by the County in its Petition are, on their face, either *tort* claims, "merged contract"

claims, or "manufacturing oversight" claims from a different contract, all of which the Second District held in the *Hill One* appeal were impermissibly framed by the First Amended Complaint.

For example, the County's very first allegation is that Hill was responsible for duties imposed on the pipe segment manufacturer -- Interpace -- by a separate contract between the County and that company. (Petition 5). The Second District held in *Hill One*, however, that:

> No responsibilities contained in the Interpace Contract could be imposed upon Hill . . . .

(Appendix G-7). Plainly, the County is now arguing to this Court that it has a well-pled contract claim against Hill for manufacturing responsibilities, despite the decision of the Second District in *Hill One* (merely re-affirmed in *Hill Two*) that it does not.

As a further example, the County's second allegation in the Petition is that Hill had a duty to inspect the manufacturing of the pipe. (Petition 5). Yet the Second District in *Hill I* held:

> We find no provision in [the County's contract with Hill] which imposed upon Hill a responsibility with respect to the pipe manufacturing process.[6/]

6/ Appendix G-6.

Here again, the County has argued its dissatisfaction with the *Hill One* decision, rather than the decision for which review is presently sought. And so it goes down through the County's list of alleged contract claims -- all of which were responded to in detail by Hill before the Second District.

The Court will also note that all of the County's so-called "well-pled" contract claims are, again, the mere incorporation by reference from its First Amended Complaint of the detailed *negligence* count allegations contained in that document. (Appendix M-24 through M-30). Despite the fact that these were scrutinized by the Second District for its *Hill One* decision (Appendix G-5 and 6), they were re-asserted before the Second District in *Hill Two* and are now re-argued here. Once again, they are presented without any attempt to excise the tort-based, contract-merged and prohibited "manufacturing oversight" claims that the Second District found to be unavailable in *Hill One*. Obviously, the County has brought to the Court nothing but its high degree of frustration with the *Hill One* panel's decision that the County pled only one valid contract claim against Hill.

As a further expression of its dissatisfaction, the County has seen fit to season its petition with references to a number of events and rulings by the Florida courts which have no value other than providing the County an outlet to vent its displeasure.

(1) The County complains that disqualification of the trial judge prior to the *Hill One* decision was unfair (Petition 10 and 11), yet the County

does not suggest to the Court that disqualification of the trial judge constituted a denial of due process.

(2) The County describes denials of interlocutory certiorari petitions (Petition 12 and 13), but it makes no attempt to connect that recitation with anything at issue before the Court.

(3) The County discusses the composition of the Second District's oral argument panels in *Hill One* and *Hill Two* (Petition 14), but it presents no argument that the panel compositions denied the County due process of law.

(4) Indeed, a majority of the appendices to the County's petition have no relevance whatsoever to any issue of due process denial which the County has raised. (*See* Appendices H, I, J, K, L, N, O, P, Q, R, S, T, V, X and Y).

These several comments and appendices are completely irrelevant to the County's petition for writ of certiorari, and they form no basis for any argument regarding a denial of federal constitutional rights.

The County's inability to focus on a precise legal issue without incorporating into its allegations and argument an entire universe of perceived ills, is exemplary of the manner in which its arguments were presented to the Second District in the two appeals which resulted in the *Hill One* and *Hill Two* decisions. The County remains unable to accept the binding determination of the *Hill One* decision that its confusing potpourri of allegations and legal theories do not translate into well-pled causes of contractual breach

under Florida law. The County remains locked in a perception of massive harm caused by Hill, and it is simply unable to accept the first decision of the Second District which analyzed with care its complaint and its contract with Hill, only to find that it had but one legal basis for pursuing a claim of contractual breach.

II. The County has provided no plausible basis for the Court's review.

The collection of cases amassed in the County's petition provides no authority for its constitutionally-cloaked charade. Minimal discussion of the lead cases demonstrates their irrelevance to the sound state law analyses of the Second District in *Hill One* and *Hill Two*.

In *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422 (8th Cir. 1986), landowners sued in federal court under the Civil Rights Act when city commissioners conceded in the course of state court proceedings that their filing of a condemnation counterclaim was merely to halt an action against them for the faulty operation of a sewer facility which had contaminated private holdings. In a legal determination which the Eighth Circuit recognized to be unique to Civil Rights Act litigation, that court found an unpled claim of denied court access based on facts alleged by the landowners' *federal* complaint for conspiracy. 780 F.2d at 1427. The Eighth Circuit did not determine that the state courts had denied access to the landowners, but that the federal district court had improperly dismissed the landowners' federal complaint under section 1983 of the Civil Rights Act. A section

1983 claim for denied access to the courts was found to be based on the commissioners' retaliatory filing of a condemnation claim in state court, in response to the landowners' complaint for injunction and damages. *Harrison* provides no support for the County's ephemeral claim that the state appellate court has denied it access to the courts by the rejection of ill-pled claims of contract breach.

Similarly unrelated to the County's case is *Procup v. Strickland*, 760 F.2d 1107 (11th Cir. 1985), in which the denial of a prisoner's access to court was founded on a blanket rule of the federal district court by which it refused to consider any of the *pro se* claims filed by the prisoner. The court merely held that, even if the prisoner had abused the courts by his persistent filings, there could be no absolute rule revoking his access for presenting grievances against his jailers. *Procup* has no principled resemblance to the County's circumstance. It has had more than full and fair access on its poorly pled potpourri of claims. It twice had full access to and appellate consideration of the same state grounds for analyzing its pleading and written contract with Hill.

A third, cited decision is *Monroe Division, Litton Business Systems, Inc. v. De Bari*, 562 F.2d 30 (10th Cir. 1977), dealing with the trial court's failure to conduct a requested evidentiary hearing on damages. That refusal rested, in part, on the district court's failure to recognize that preliminary hearings on injunctions had not provided an opportunity for De Bari to present evidence of his damages. In contrast, the County in this case, had abundant opportunity to plead contract claims, including the right of amendment (which it

exercised). It simply failed to plead a Florida law basis for more than one contract claim.

Wolff v. McDonnell, 418 U.S. 539 (1974), stands for the important, but here inapposite proposition that when a state establishes a right not otherwise required by the constitution, that right can be extinguished only by resort to procedural due process. The case involved a prisoner's right to "good-time" reductions in his sentence, of which he was deprived without recourse to procedures consistent with due process. No state court has denied the County notice or an opportunity to allege contract claims against Hill which would have been consistent with substantive standards of state law.

So, too, is *Hoōks v. Wainwright*, 352 F. Supp. 163 (M.D. Fla. 1972), outside the bounds of useful principle here. In that case, the court determined that Florida's prison administrators had denied inmates access to the courts because neither lawyers nor adequate libraries were available to them. It cannot be said that the County has been denied the opportunity to prepare and present its case to the Florida courts.

The least relevant authority provided by the County is *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986). *Ariyoshi* involved 60 years of litigation, culminating (temporarily) in the drastic decision of the Hawaii Supreme Court to overrule, on its own determination, Hawaii's established system of water rights law. There was no prior opportunity for landowners to demand just compensation for property rights in prior, vested years once the court newly-declared an unprecedented territorial water rights system. When rehearing was

sought by divested water owners, they got no discursive response on the due process and just compensation claims that were presented. In this unique circumstance, the Ninth Circuit found no inhibition to the federal court's enjoining the taking of landowners' property without appropriate condemnation proceedings. The County points to no cataclysmic change made by the *Hill Two* decision to Florida's substantive law of contracts. That law has not been altered one whit, and the County had full notice of the precedents utilized by the Second District in reaching its decision.

In sum, the precedents relied on by the County to make its case for a due process deprivation are inapt here, reminiscent of the admixture of theories which marked its pleadings and arguments in the lower courts. The County has established no plausible basis for certiorari review.

CONCLUSION

Due process has been accorded the County in protracted state court proceedings. The courts of Florida were accessed at length by the County.

The decision of the Second District was a soundly-based, re-affirmation of the court's rejection of implausible pleading theories presented by the County. The Second District had properly and legally limited the County's claims against Hill, in its *Hill One* decision, to one well-pled contract claim. There is no reason for the Court to grant certiorari review of the *Hill Two* decision.

Respectfully submitted,

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